BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n)	)	
and 332 of the Communications	)	GEN Docket No. 93-252
Act Concerning Regulatory	)	
Treatment of Mobile Services	)	

To: The Commission

COMMENTS OF
LOWER COLORADO RIVER AUTHORITY

Shirley S. Fujimoto
Brian Turner Ashby

Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

November 8, 1993

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n)	)	
and 332 of the Communications	)	**GEN. Docket No. 93-252**
Act Concerning Regulatory	)	
Treatment of Mobile Services	)	

To: The Commission

COMMENTS OF LOWER COLORADO RIVER AUTHORITY

Lower Colorado River Authority ("LCRA"), by its attorneys, hereby respectfully submits these Comments in response to the Notice of Proposed Rule Making ("NPRM") adopted by the Federal Communications Commission ("Commission") on September 23, 1993 in the above-referenced proceeding.[1/]

I. Preliminary Statement

1. Lower Colorado River Authority was established as a conservation and reclamation district to establish flood control on the lower Colorado River and provide electric energy throughout central Texas. Although a governmental agency of the state of Texas, LCRA receives no tax revenues and relies upon the sale of water and electricity to fund

---

1/ FCC 93-454 (released October 8, 1993).

its various public service programs. Today, LCRA has a electric generating capacity of 2250 megawatts, and distributes electric energy to 44 wholesale customers including 11 electric cooperatives and 33 municipalities. LCRA's service territory covers 31,000 square miles and reaches over 800,000 end users.

2. To support its various public service programs, LCRA proposes to install a 900 MHz land mobile radio system throughout its service territory. This system is still in the planning stages, but applications requesting authority to operate such a system will soon be filed with the Commission. While the primary impetus for implementing this system is to meet LCRA's internal land mobile communication requirements, LCRA also envisions using the system's reserve capacity, provided there is reserve capacity, to provide land mobile communication service to other entities on a nonprofit, cost-shared basis pursuant to Section 90.179 of the Commission's Rules. 47 C.F.R.
§ 90.179 (1993).

3. In light of these plans, LCRA is pleased to have this opportunity to submit its views on the Commission's aforementioned NPRM. The NPRM was adopted by the Commission in response to Congressional directives contained in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). Among other things, the Budget Act amended Sections 3 (n)

and 332 of the Communications Act of 1934 ("Communications Act") to create a comprehensive regulatory scheme for all mobile radio services. 47 U.S.C. §§ 153 (n) and 332 (1993). These services include existing common carrier mobile services, private land mobile services, and future mobile services such as Personal Communications Services ("PCS").

4. Under amended Section 332, all mobile services are divided into two categories: (1) commercial mobile services; and (2) private mobile services. Commercial mobile service providers will be subject to some common carrier regulation under Title II of the Communications Act, but private mobile service providers will not be subject to any common carrier regulation.

5. Commercial mobile services are defined in amended Section 332 as any mobile service "that is provided for-profit [emphasis added] and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." Private mobile services are defined as any mobile service "that is not a commercial mobile service or the functional equivalent of a commercial mobile service." In the NPRM, the Commission asks for comment on, among other things, how these definitions should be interpreted and how the various

existing mobile services should be classified under these definitions.

II. Comments

6. LCRA is generally supportive of the goal behind the Budget Act, namely, leveling the regulatory playing field between commercial providers of mobile radio services. LCRA recognizes that under the existing regulatory scheme there are certain private land mobile services which are similar to some common carrier mobile services, but are not similarly regulated. However, LCRA is concerned that these laudable efforts at leveling the regulatory playing field may result in an overbroad interpretation of the commercial mobile service definition and the unnecessary imposition of common carrier regulation on entities such as LCRA. Accordingly, LCRA urges the Commission to adopt reasonable interpretations of the commercial and private mobile service definitions that are consistent with Congressional intent, and at a minimum, exclude from the commercial mobile service definition land mobile systems that are operated pursuant to Section 90.179 on a nonprofit, cost-shared basis.

A. Commercial Mobile Service Definition

7. A plain reading of the commercial mobile service definition excludes nonprofit, cost-shared land mobile systems. The reason for this is that the definition specifically requires mobile services to be offered on a for-profit basis in order to be classified as a commercial mobile service. It is therefore axiomatic that a land mobile system, such as the one LCRA intends to implement, would not fall within the scope of the commercial mobile service definition if operated on a nonprofit, cost-shared basis in accordance with Section 90.179.

8. Under Section 90.179, sharing arrangements among entities eligible for licensing under Part 90 of the Commission's Rules, 47 C.F.R. § 90.1 et seq., have long been recognized as a legitimate way by which entities eligible in their own right to license particular frequencies could realize economies of scale through the sharing of facilities. These sharing arrangements must be operated pursuant to written agreements which spell out, among other things, the method by which costs are apportioned among the users of the facilities. In addition, licensees of shared land mobile systems are required under Section 90.179 (e) to file annual reports with the Commission explaining the status of their sharing arrangements and listing the users

of their facilities. Given these existing regulations, the Commission will have adequate means to ensure that providers of for-profit, commercial mobile services do not masquerade as providers of nonprofit, cost-shared private mobile services.

9. Relatedly, even if the Commission were inclined to ignore the plain language of the commercial mobile service definition, there is no logical reason for doing so since this would subject nonprofit, cost-shared land mobile systems to unnecessary regulation. The purpose behind the Budget Act was clearly to level the regulatory playing field between similarly situated mobile service providers. In other words, entities which provide service for profit to a wide class of users and which may compete with each other, such as operators of Specialized Mobile Radio ("SMR") and cellular telephone systems, should not be subject to disparate regulatory treatment.

10. However, there is a significant difference between SMR and cellular telephone operators, and entities which offer land mobile service on a nonprofit, cost-shared basis. As new technological advances are made, some types of SMR systems may be in a position to compete with cellular services. Likewise, some PCS operators are expected to offer services similar to those offered by cellular telephone companies. Disparate regulatory treatment under

these circumstances can have anticompetitive effects because it can result in irregularities in the cost and burdens of doing business. It cannot reasonably be said, however, that providers of nonprofit, cost-shared land mobile services are competitive with SMR or cellular telephone operators. Generally speaking, services of this type are established to provide a very small number of entities with reliable and affordable land mobile communications. Unlike certain SMR and cellular telephone companies, they are not designed to be competitive, for-profit ventures. As such, there is no reason for subjecting providers of nonprofit, cost-shared land mobile services to the same degree of regulation as competitive SMR and cellular telephone companies.

11. In the event that the Commission includes nonprofit, cost-shared land mobile services in the commercial mobile service definition and the providers of such services are subject to common carrier regulation, the burdens imposed on these service arrangements could eliminate the incentive for entering into these arrangements altogether. For instance, even minimal common carrier regulation would require these entities to provide service indiscriminately to the public. Since the purpose behind many of these non-profit, cost-shared arrangements is to enable a small group of similar entities with compatible communications requirements to obtain reliable and cost

effective land mobile communications, a requirement that service be provided indiscriminately to the public would make these arrangements impractical.

B. Private Mobile Service Definition

12. While it is obvious that nonprofit, cost-shared private land mobile radio systems should not fall within the commercial mobile service definition, the private mobile service definition is somewhat more problematic. As the Commission points out in the NPRM, the private mobile service definition - any mobile service that is not a commercial mobile service or the functional equivalent of such a service - could be interpreted in one of two ways. First, a mobile service could be classified as a private mobile service if: (1) it does not meet the commercial mobile service definition; or (2) it is not the functional equivalent of a commercial mobile service. In other words, a service which meets the commercial mobile service definition could still be classified as a private mobile service if it is not functionally equivalent to a commercial mobile service.

13. On the other hand, the private mobile service definition could also be interpreted to mean that a mobile service could be classified as a private mobile service only

if: (1) it does not meet the commercial mobile service definition; or (2) it is not the functional equivalent of a commercial mobile service. Under this interpretation, a service which does not meet the commercial mobile service definition could still be classified and regulated as such if the service is functionally equivalent to a commercial mobile service.

14. LCRA believes that the only logical interpretation of this definition is the one outlined first. Under the second interpretation, services which clearly do not meet the commercial mobile service definition could still be classified and regulated as commercial mobile services if deemed to be functionally equivalent to a commercial mobile service. Such a result would be incongruous and may result in some mobile services being classified and regulated as commercial mobile services even though they do not fall within the commercial mobile service definition. In the case of nonprofit, cost-shared land mobile systems, use of the second interpretation could result in the classification and regulation of such systems under the commercial mobile service definition even though nonprofit, cost-shared systems clearly fall outside of that definition.

15. While it would be difficult to argue that nonprofit, cost-shared land mobile services are functionally equivalent to commercial mobile services, the test that will

ultimately be used to determine functional equivalency is not known and is likely to be very subjective. Consequently, it is possible that some nonprofit, cost-shared land mobile services could be deemed functionally equivalent to commercial mobile services, and for this reason, LCRA urges the Commission to employ the first interpretation of the private mobile service definition so as to avoid even the possibility that services which clearly fall outside the commercial mobile service definition might be classified and regulated pursuant to that definition.

WHEREFORE, THE PREMISES CONSIDERED, the Lower Colorado River Authority respectfully requests that the Federal Communications Commission take action in this proceeding consistent with the views expressed herein.

Respectfully submitted,

LOWER COLORADO RIVER AUTHORITY

By: 

Shirley S. Fujimoto
Brian Turner Ashby

Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

November 8, 1993